

## United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	98 C 358	DATE	6/21/2000
CASE TITLE	BEM I, L.L.C. vs. Anthropologie, Inc.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

## MOTION:

--

## DOCKET ENTRY:

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☒ Status hearing set for 7/7/2000 at 9:00 A.M..
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] Enter Memorandum Opinion And Order. BEM's motion for reconsideration (Doc. No. 70-1) is denied.

- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input checked="" type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	courtroom deputy's initials	Date/time received in central Clerk's Office	5	Document Number  77
			number of notices	
			6-22-00 date docketed	
			Blw docketing deputy initials	
			6/21/2000 date mailed notice	
ETV			ETV	
			mailing deputy initials	

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

BEM I, L.L.C., an Illinois limited liability  
corporation,

Plaintiff,

v.

ANTHROPOLOGIE, INC., a Pennsylvania  
corporation,

Defendant.

---

ANTHROPOLOGIE, INC.,

Third-Party Plaintiff,

v.

BEM I, L.L.C., HAROLD EISENBERG, MAX  
PLZAK and NAGLE HARTRAY DANKER  
KAGAN McKAY ARCHITECTS PLANNERS,  
INC.,

Third-Party Defendants.

No. 98 C 0358

Judge  
Rebecca R. Pallmeyer

DOCKETED  
JUN 22 2000

MEMORANDUM OPINION AND ORDER

Plaintiff, BEM I, L.L.C. ("BEM") filed this forcible entry and detainer action against Defendant Anthropologie, Inc. ("Anthropologie") in the Circuit Court of Lake County, Illinois on December 29, 1997. In its initial complaint, BEM sought possession of space leased to Anthropologie, and \$48,197.23 in back rent due from September 18, 1997 through November 30, 1997. On January 19, 1998, BEM filed a motion to amend its complaint to increase the *ad damnum* to \$87,811.39, reflecting amounts of rent allegedly owed by

11

Anthropologie for the months of December 1997 and January 1998. During a proceeding in state court, Anthropologie announced its intention to remove the action to federal court under the court's diversity jurisdiction. BEM promptly withdrew its motion to amend, and instead moved orally for an award of use and occupancy in addition to its claims for possession and past due rent.

Anthropologie nevertheless proceeded to remove the case to this court on January 22, 1998. Some 21 months later, on October 7, 1999, BEM moved for remand arguing that because an action for forcible entry and detainer is limited in its scope, the amount in controversy should not be determined with reference to future rents or to tenant improvements. On December 14, 1999, this court denied BEM's motion to remand, determining that it had subject matter jurisdiction over the action because the amount in controversy at the time of removal exceeded \$75,000. *See BEMI, L.L.C. v. Anthropologie, Inc.*, No. 98 C 0358, 1999 WL 1212643, at \*1 (N.D. Ill. Dec. 14, 1999). In so concluding, the court reasoned that the value of possession of the leased premises, at a minimum, reflected the amount of back rent due at the time of removal, including the months of December 1997 and January 1998. *Id.* at \*6. BEM now moves this court to reconsider its order denying the motion to remand, arguing that the court miscalculated the back rent due at the time of removal, and also asserting that the court improperly relied on BEM's withdrawn motion to amend its forcible entry complaint in state court.

BEM asserts that the court miscalculated the back rent due at the time of removal by including rent for the month of January 1998. According to BEM, the lease terminated on

December 26, 1997 pursuant to a notice of default. Any monies owed to BEM subsequent to the termination of the lease constitute damages, BEM urges, rather than rent, and are not recoverable in a forcible entry and detainer action.

The court disagrees with BEM's characterization of the January rent as damages. Under the Illinois Forcible Entry and Detainer Statute, a property owner "may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof . . . [w]hen lands are held and occupied by any person without any special agreement for rent." See 735 ILCS 5/9-201(2). Following the termination of a written lease, a former tenant who continues to occupy the space without any special agreement for rent is liable for "use and occupancy." See *People ex rel. Dept. of Transp. v. Cook Devel. Co.*, 274 Ill. App. 3d 175, 180, 653 N.E.2d 843, 847 (1st Dist. 1995). Accordingly, BEM's oral motion to add a claim for use and occupancy on January 21 put Anthropologie on notice of facts supporting removal. In the language of the removal statute, the January 21, 1998 Circuit Court Order entering and continuing BEM's oral motion constituted "a motion, order or other paper" sufficient to support the removability of the action. See 28 U.S.C. § 1446(b); see also *Yarnevic v. Brink's Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) ("motion, order or other paper requirement is broad enough to include any information received by the defendant, whether communicated in a formal or informal manner."); *Hessler v. Armstrong World Indus., Inc.*, 684 F. Supp. 393, 394 (D. Del. 1988) (oral statements in court and correspondence among defense counsel provided defendant with adequate notice that the action had become removable).

The court recognizes that in the context of motions to amend, some courts have held

that an otherwise unremovable case does not become removable by the mere filing of the motion; instead these courts hold that the motion must actually be granted, *see, e.g., Douklias v. Teacher's Ins. & Annuity Ass'n*, 35 F. Supp. 2d 612, 614 (W.D. Tenn. 1999), or that the amended pleading must actually be served, *see, e.g., Miller v. Stauffer Chem. Co.*, 527 F. Supp. 775, 777 (D. Kan. 1981). Under this rationale, because the oral motion was not granted before Anthropologie removed, BEM argues that it was not entitled to recover more than the \$48,197.23 *ad damnum* amount in the complaint, less than the \$75,000 jurisdictional floor, and therefore the case did not become removable upon its making of the oral motion. This assertion is also unavailing. First, under Illinois law, a specific prayer for relief recited in a complaint does not limit the relief obtainable. *See* 735 ILCS 5/2-604. Second, a claim for rent under the Illinois Forcible Entry and Detainer Statute includes claims for use and occupancy. *See* 735 ILCS 5/9-201(2). In seeking to recover rent, BEM could have presented the state court with evidence showing that it was entitled to more than the amount it recited in its prayer for relief, even without amending its complaint to specifically include a claim for use and occupancy. Although the mere fact that BEM could have tried to obtain a larger recovery does not make a case removable, *see Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 374 (7th Cir. 1993), here BEM's oral motion to recover use and occupancy for December 1997 and January 1998 gave notice to Anthropologie that BEM indeed sought to recover more than its *ad damnum* request. Under its claim for rent in the forcible entry and detainer action, those amounts were recoverable; that the oral motion was never granted is therefore irrelevant.

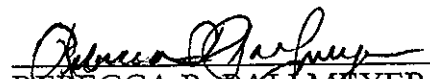
BEM argues further that, in any event, the amount allegedly owed for use and occupancy for December 1997 and January 1998 is not in controversy because on January 27, 1998, Anthropologie sent BEM a check in the amount of \$48,857.49 for use and occupancy for those months. BEM argues that because Anthropologie paid this amount voluntarily, it was never "in controversy." In making this argument, however, BEM fails to acknowledge that jurisdiction is determined from facts that existed at the moment of removal. *See Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir. 1993). Therefore, the court is precluded from considering Anthropologie's payment five days after the action was removed.

Finally, the court notes that it did not improperly rely on BEM's withdrawn motion to amend the Forcible Complaint to increase the *ad damnum* amount. Independent of that motion, the court determined that at the time of removal, Anthropologie allegedly owed BEM \$87,811.39 in back rent (including use and occupancy after termination of the lease). *See BEM*, 1999 WL 1212643, at \*6. The court merely noted that the withdrawn motion seeking to increase its claim for damages in the amount of \$87,811.39 bolstered the conclusion that the claim was worth more than \$75,000. *See id.*

Accordingly, BEM's motion for reconsideration (Doc. 70-1) is denied.

ENTER:

Dated: June 21, 2000

  
REBECCA R. PALLMEYER  
United States District Judge